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Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

LEE MAX BARNETT,	)	No. CIV S 99-2416 DFL CMK P
	)	
Petitioner,	)	<b><u>DEATH PENALTY CASE</u></b>
	)	
vs.	)	<b>JOINT SETTLED STATEMENT</b>
	)	
ROBERT L. AYERS, JR., Acting Warden	)	
of San Quentin State Prison,	)	
	)	
Respondent.	)	
_____	)	

The parties submit the following proposed settled statement to memorialize what took place at the September 6, 2006, hearing in this matter. Due to an equipment malfunction, the

1 hearing was not recorded. This statement is not intended to be a transcript of the proceedings,  
2 but only to highlight the issues discussed.

3 The Court advised Petitioner's counsel that it had received a lengthy *pro se* pleading  
4 from Petitioner. The Court stated that he agreed with Magistrate Judge Nowinski and the  
5 California Supreme Court – that pleadings and papers should be filed by counsel.

6 The Court suggested that the parties meet and confer to discuss issues of exhaustion,  
7 relation back and procedural default pertaining to Petitioner's third amended habeas corpus  
8 petition. The parties agreed that a meet-and-confer would be productive.

9 Petitioner's counsel advised the Court that they would be filing a motion to declare that  
10 the Anti-Terrorism and Effective Death Penalty Act (AEDPA) should not apply to his petition.  
11 Respondent's counsel requested that such motion be resolved early, before procedural issues.  
12 The Court set a deadline of November 3, 2006, for Petitioner to file his motion, and a deadline of  
13 January 5, 2007, for Respondent to file an opposition.

14 The Court set a deadline of November 3, 2006, by which the parties will meet and confer  
15 to discuss exhaustion, relation back, and procedural default.

16 Petitioner's counsel asked the Court if it would consider bifurcating the issues, so that the  
17 guilt-innocence claims would be resolved first, before the penalty phase claims. Petitioner's  
18 counsel advised that she had raised the issue with Respondent's counsel before the hearing.  
19 Respondent's counsel replied that Respondent was opposed to the idea because it would delay  
20 ultimate resolution of the litigation. If Petitioner prevailed on a guilt-innocence claim in the  
21 district court, but that determination was reversed on appeal, the parties would then have to  
22 return to the district court to litigate the penalty phase claims. The Court suggested that the  
23 parties discuss bifurcation in the meet-and-confer session.

24 Respondent's counsel proposed that Respondent might want to file a summary judgment  
25 motion on purely legal claims. Respondent felt such a motion might expedite the litigation.  
26 Petitioner's counsel's initial impression was negative because most of the claims, particularly the  
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1 ineffective assistance of counsel claims, involved cumulative error. The Court suggested that the  
2 parties discuss summary judgment in the meet-and-confer session.

3 Respondent's counsel raised the issue of Mr. Barnett's competency, based on a letter that  
4 Mr. Barnett had written to the Court. Respondent was concerned that competency be addressed  
5 now, not later, perhaps on the eve of an evidentiary hearing, causing delay. Petitioner's counsel  
6 responded that they did not intend to raise the issue of Mr. Barnett's competency at this time,  
7 and that they did not believe that issues concerning Mr. Barnett's competency would delay the  
8 proceedings. Petitioner's counsel stated that Mr. Barnett was interested in expediting, not  
9 delaying, the proceedings. Counsel for the parties discussed what happened with the  
10 competency proceedings in the case of *Stanley v. Ayers*, CIV S-1500 FCD GGH P; there was  
11 disagreement about what had happened in that case.  
12

13 The Court set a deadline of December 1, 2006, for the parties to submit a joint statement  
14 regarding exhaustion, timeliness, and procedural default as to the claims in the third amended  
15 habeas corpus petition. The Court scheduled a telephonic status conference for Wednesday,  
16 December 6, 2006, at 10:00 a.m.

17 Submitted December 1, 2006.

18 ROBERT D. BACON

19 DANIEL J. BRODERICK  
20 Federal Defender

21 /s/ Jennifer M. Corey  
22 JENNIFER M. COREY  
23 Assistant Federal Defender

24 Attorneys for Petitioner


25 BILL LOCKYER  
26 Attorney General of the State of California

27 /s/ Tami M. Warwick  
28 TAMI M. WARWICK  
Deputy Attorney General

Attorneys for Respondent

1 It is hereby ORDERED that the Joint Settled Statement is APPROVED.

2  
3 DATED: December 6, 2006.

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6 **CRAIG M. KELLISON**  
7 UNITED STATES MAGISTRATE JUDGE  
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